

**DIAMOND B CONSTRUCTION
COMPANY LLC**

VERSUS

**JAMES CONSTRUCTION GROUP
LLC, ET AL.**

DOCKET NO. C-20201214 K

15TH JUDICIAL DISTRICT COURT

PARISH OF LAFAYETTE

STATE OF LOUISIANA

**MOTION to DISMISS PURSUANT to LA. R.S. 48:256.9, EXCEPTION of IMPROPER
SERVICE, EXCEPTION of PREMATURITY and
MOTION to STRIKE**

NOW INTO COURT, through undersigned counsel, comes defendant, Department of Transportation and Development, (“DOTD” or “Department”), which moves this Court to dismiss DOTD as defendant in the Petition for Concursus (“Petition”) filed by plaintiff, Diamond B Construction Company, LLC (“Plaintiff”) based on La. R.S. 48:256.9 and improper service of process; and, in the alternative, Dismiss the Petition or Stay the Proceeding based on the Exception of Prematurity, and, in the alternative, Grant the Motion to Strike Insufficient Pleadings and Demands on the following grounds:

Motion to Dismiss DOTD

1.

The Department is entitled to be dismissed from the Concursus proceeding because the Plaintiff has failed to object to the sufficiency or solvency of the Payment Bond within 10 days of service on each claimant having recorded claims.

2.

Plaintiff filed the Petition on February 28, 2020 and sent it electronically to DOTD on March 16, 2020.

3.

Plaintiff is the only “claimant” as defined by La. R.S. 48:256.5.

4.

Plaintiff has not objected to the sufficiency or solvency of the Payment Bond.

5.

DOTD recorded the Payment Bond in the amount of \$57,100,000.00 on February 20, 2014, in the Lafayette Parish Clerk of Court’s Office of the Recorder of Mortgages.

6.

The Clerk of Court issued a Certificate on Monday, April 20, 2020, stating that Plaintiff has not objected to the sufficiency or solvency of the Payment Bond.

7.

Pursuant to La. R.S. 48:256.9, the Certificate relieves the Department of any personal liability and the recorder of mortgages is required to cancel all of the recorded claims.

Exception of Improper Service

8.

The Concursus Petition was served electronically on counsel for the Department on March 16, 2020.

9.

Electronic service of initial pleadings is improper.

Exception of Prematurity

10.

In the alternative, DOTD moves this Court to dismiss or stay this Concursus Proceeding on the grounds that it is premature.

11.

The Plaintiff filed the Petition on February 28, 2020 after filing a statement of claim of sums owed by the contractor, James Construction Group, LLC (“JCG”).

12.

Plaintiff’s claim of sums owed by JCG is directly related to JCG’s claims against Plaintiff in a pending arbitration proceeding initiated by JCG on February 27, 2019.

13.

In the arbitration proceeding, JCG alleges that Plaintiff’s performance was delayed and non-conforming.

14.

In Paragraph 16.2 of the subcontract between JCG and Plaintiff, JCG has the right to require subcontractor (Plaintiff) to arbitrate any and all claims, disputes, and other matters arising out of the subcontract.

15.

As intended and required by the subcontract, the arbitration will determine what, if anything, JCG owes the Plaintiff.

Motion to Strike Insufficient Demands

16.

For the following reasons, DOTD moves this Court for an order striking the insufficient pleadings and demands set forth in the Petition.

17.

Multiple paragraphs of the Petition refer to a retainage bond or allege that the Court should order DOTD to deposit into the Court's Registry the sum of \$3,019,214.04 in funds by way of a retainage bond it received from JCG.

18.

It is the *Payment Bond* (not the Retainage Bond), in the amount of \$57,100,000.00, that guarantees payment of claims by claimants, such as Plaintiff, and for that reason, references to the Retainage Bond should be ordered stricken from Plaintiff's petition.

19.

In Paragraph 18 of the Petition, Plaintiff states that DOTD "is still holding contract funds and a retainage bond in "lieu of the sums required to be withheld from progress payments under the provisions of Louisiana Revised Statutes 48:256.1, inclusive of overpayments to the Design-Builder and stipulated damages as assessed."

20.

In Paragraphs 21 and 22, Plaintiff alleges that Federal Insurance Company and Western Surety Company, as sureties, are each obligated to the Plaintiff by virtue of the payment bond "and/or the retainage bond it furnished JCG."

21.

In Paragraph 1 of the Prayer for Relief, Plaintiff asks this Court to order the Department to deposit into the Registry of the Court "all sums withheld from James Construction Group, LLC, as liquidated damages or the sums available to the Louisiana Department of Transportation and Development by way of the retainage bond, up to the sum

of THREE MILLION NINETEEN THOUSAND TWO HUNDRED FOURTEEN AND 01/100 DOLLARS (\$3,019,214.01).”

22.

In Paragraph 2 of the Prayer for Relief, Plaintiff requests, in the alternative, that the Court order JCG and/or its sureties to deposit into the Registry of the Court “an amount equal to the retainage bond, in the full sum of . . . \$2,855,000.00.”

23.

In Paragraph 4 of the Prayer for Relief, Plaintiff requests a “*Rule to Show Cause*” as to why “all unexpended funds, including, but not limited to, the sums secured by the retainage bond and those funds held as liquidated damages by the Louisiana Department of Transportation and Development, and or an amount equal to the retainage bond should not be deposited into the Registry of the Court . . .”

24.

For these reasons and the reasons more fully set forth in the Department’s Memorandum in Support of Motions to Dismiss and, alternatively: a Motion to Stay and a Motion Strike Insufficient Pleadings and Demands, incorporated herein by reference as if fully written herein, DOTD respectfully submits that this Court should 1) grant the Motion to Dismiss, with prejudice, DOTD from the Concursus proceeding and order the Recorder of Mortgages to cancel all recorded claims, all in accordance with La. R.S. 48:256.9; 2) grant the Motion to Dismiss based on the Declinatory Exception of Improper Service; 3) alternatively, sustain the Exception of Prematurity and order the Concursus proceeding be stayed or dismissed; and 4) alternatively, order stricken the references to the “retainage bond” in Paragraph 18 of the Petition and Paragraphs 1, 2, and 4 in Plaintiff’s Prayer for Relief with all costs incurred in connection with these Motions and Exceptions taxed to Plaintiff, Diamond B Construction Company, LLC.

WHEREFORE, premises considered, mover, Department of Transportation and Development, State of Louisiana, prays that this Court issue to plaintiff, Diamond B Construction Company, LLC, an order to show cause on May 11, 2020 why this Court should not:

I. Grant the Motion to Dismiss and the cancellation of all recorded claims as required by La. R.S. 48:256.9; grant the Motion to Dismiss based on improper service of

process; alternatively, sustain the Exception of Prematurity; and, alternatively grant the Motion to Strike Insufficient Pleadings and Demands, filed by mover, Department of Transportation and Development, State of Louisiana, on the grounds that:

- A. Plaintiff failed to object to the sufficiency or solvency of the Payment Bond within the time required;
- B. Plaintiff failed to serve the Petition on the Department in the manner required by the Louisiana Code of Civil Procedure;
- C. Plaintiff's claim is the subject of a required arbitration proceeding pending between JCG and Plaintiff; and
- D. Plaintiff has no right to request the deposit of any money from the Retainage Bond.

II. Accordingly, why this Court should not:

- A. Order the dismissal of DOTD from Plaintiff's Petition;
- B. Order the cancellation of all recorded claims;
- C. Order, in the alternative, the dismissal or stay of this Concursus proceeding; and
- D. Order, in the alternative, stricken all references to "retainage bond" in Paragraphs 18, 21, and 22 of the Petition and Paragraphs 1, 2, and 4 of the Prayer for Relief; and

III. This Court should not tax all costs to Plaintiff, Diamond B Construction Company, LLC.

Respectfully Submitted:

**DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT
State of Louisiana**



BRANDON J. BABINEAUX (Bar Roll No. 30853)
1201 Capitol Access Road, Room No. N-335
Baton Rouge, LA 70802
Phone: (225) 242-4612
Fax: (225) 379-1983



NANCY C. GRUSH (Bar Roll No. 18237)

1201 Capitol Access Road, Room No. N-337
Baton Rouge, LA 70802
Phone: (225) 242-4666
Fax: (225) 379-1983

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Motion to Dismiss, alternatively, Motion to Stay, and Motion to Strike Insufficient Pleadings and Demands, has been served upon counsel of record for Plaintiff and Defendant, James Construction Group, LLC, by placing a copy of same in the United States mail, postage prepaid and properly addressed as follows:

Russell W. Wray and
Jacob A. Altmyer
Wray and Associates
10182 Weevil Street
P.O. Box 1848
St. Francisville, LA 70775

William H.L.Kaufman
Ottinger Hebert, LLC
1313 West Pinhook Rd. (70503)
P.O. Drawer 52606
Lafayette, LA 70505-2606

Murphy J. Foster
Jacob E. Roussel and
David C. Fleshman
Breazeale, Sachse & Wilson, LLP
One American Place, 23rd Floor
P.O. Box 3197
Baton Rouge, LA 70821-3197

Baton Rouge, Louisiana, on this ____ day of April, 2020.



Brandon J. Babineaux

**DIAMOND B CONSTRUCTION
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VERSUS

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15TH JUDICIAL DISTRICT COURT

PARISH OF LAFAYETTE

STATE OF LOUISIANA

ORDER TO SHOW CAUSE

The allegations of the foregoing Motion to Dismiss and Motion to Strike Insufficient Pleadings and Demands considered and in accordance with the applicable laws:

IT IS ORDERED AND DECREED that Plaintiff, Diamond B. Construction Company, show cause on the _____ day of _____, 2020, at _____ o'clock, ___m. why this Court should not:

I. Grant the Motions to Dismiss, alternatively, sustain the Exception of Prematurity, and alternatively, grant the Motion to Strike Insufficient Pleadings and Demands, filed by mover, Department of Transportation and Development, State of Louisiana, on the grounds that:

A. Plaintiff failed to object to the sufficiency or solvency of the Payment Bond within the time required;

B. Plaintiff failed to serve the Petition on the Department in the manner required by the Louisiana Code of Civil Procedure;

C. Plaintiff's claim is the subject of a required arbitration proceeding pending between JCG and Plaintiff; and

D. Plaintiff has no right to request the deposit of any money from the Retainage Bond.

II. Accordingly, why this Court should not:

A. Order the dismissal of DOTD from the Concurus Petition;

B. Order the cancellation of all recorded claims;

C. Order, in the alternative, the dismissal or stay of this Concurus proceeding; and

D. Order, alternatively, stricken all references to “retainage bond” in Paragraphs 18, 21, and 22 of the Petition and Paragraphs 1, 2, and 4 of the Prayer for Relief; and

III. This Court should not tax all costs to Plaintiff, Diamond B Construction Company, LLC.

THUS DONE AND SIGNED on the ____ day of _____, 2020.

Hon. Patrick L. Michot
District Judge
15th Judicial District Court

PLEASE SERVE:
Counsel of record for Plaintiff:

Russell W. Wray and
Jacob A. Altmyer
Wray and Associates
10182 Weevil Street
P.O. Box 1848
St. Francisville, LA 70775

and

William H.L. Kaufman
Ottinger Hebert, LLC
1313 West Pinhook Rd. (70503)
P.O. Drawer 52606
Lafayette, LA 70505-2606

Counsel of record for Defendant:

Murphy J. Foster
Jacob E. Roussel and
David C. Fleshman
Breazeale, Sachse & Wilson, LLP
One American Place, 23rd Floor
P.O. Box 3197
Baton Rouge, LA 70821-3197